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CIMB BANK BHD & ANOR v. TAN HOO ENG & ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
NOR BEE ARIFFIN JCA
AHMAD NASFY YASIN JCA
[CRIMINAL APPEAL NOS: A-05-202-05-2021
& A-05-203-05-2021]
18 DECEMBER 2023

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Abstract – *The mere fact that a contempt complained of emanated from a criminal proceeding does not necessarily render the contempt a criminal contempt. Proceedings for contempt is separate and distinct from the proceedings as regards to the main matter before the court. If the contempt proceedings are initiated by an aggrieved or affected party against a party in breach to enforce any court order, then, it will, with limited exception, be a civil contempt and the proceedings will be civil in nature.*

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CIVIL PROCEDURE: *Originating motion – Application for – Abridgement of time to file and serve petitions of appeal – Whether petitions of appeal filed out of time – Appeals emanated from committal proceedings – Whether contempt complained of civil or criminal in nature – Whether memorandum of appeals ('MOA') and appeal records ('AR') served and filed in nature of civil for criminal appeals correct – Whether MOA and AR served and filed in nature of civil ought to be used in criminal appeals*

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The respondent owned two bank accounts with the first appellant, CIMB Bank Bhd. These bank accounts were frozen by the first appellant due to two freezing orders and one seizure order which was filed by the Public Prosecutor. Subsequently, upon the respondent's application, the Ipoh High Court ('HC') ordered the first appellant to release the said bank accounts ('HC order'). The same HC order also provided that the freezing orders were set aside. However, the HC order, among others, was silent on the seizure order. Hence, the first appellant applied to the HC for clarification. During the hearing of the clarification application, the HC opined that: (i) since the first appellant was not a party to the proceedings, it had no *locus standi* to seek a clarification regarding the HC order; and (ii) the seizure order had also been set aside *via* the HC order. Following this, the first appellant released the respondent's bank accounts. Nevertheless, the respondent *via* a letter to the first appellant, gave a notice that the same had committed contempt of court by failing to comply with the HC order. But the respondent would not commence any committal proceedings if the first appellant or its solicitor tendered an unreserved apology to the HC within seven days. Therefore, the first appellant and its solicitor, through letters to the HC, complied with the

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respondent's demand. However, thereafter, the respondent filed an *ex parte* application and obtained leave to commence the first and second committal proceedings against the appellants. This prompted the appellants to file encls. 47 and 71 to set aside the order for leave granted in respect of the first and second committal proceedings. These enclosures were then heard together and dismissed by the HC. Aggrieved, the appellants filed Appeals 202 and 203, respectively, against the decisions on encls. 47 and 71. Further, as the respondent had raised a preliminary objection against Appeals 202 and 203, the appellants also filed the present motions, *ie*, encl. 45 in Appeal 202 and encl. 39 in Appeal 203, for abridgement of time for filing and serving the petitions of appeal in respect of both appeals which were filed out of time. The said preliminary objection was that, *inter alia*, the petitions of appeal filed by the appellants failed to comply with r. 65(1) of the Rules of the Court of Appeal 1994 ('RCA') and s. 53(1) of the Courts of Judicature Act 1964 ('CJA') because: (i) the petitions of appeal were filed out of time. Considering that under s. 53(1) of the CJA the petitions of appeal must be filed within ten days upon receipt of the appeal records from the High Court, the petitions of appeal should have been filed by the appellants on 11 July 2021 as the appeal records containing the HC's grounds of judgment had been served and received by the appellants, respectively, on 1 and 2 July 2021; (ii) although the appellants had served and filed its memorandum of appeals and appeal records on 16 June 2021 ('16 June 2021 MOA and AR'), these documents were civil in nature but the present appeals were criminal appeals; (iii) although during the case management dated 5 July 2021, the Deputy Registrar instructed the appellants to file their petitions of appeal on 11 August 2021, the appellants should have realised that the said date was way beyond the statutory required ten days' time limit and that the actual time limit was on 11 July 2021; and (iv) since there were no other explanations proffered by the appellants regarding the delay in filing the petitions of appeal, encls. 45 and 39 ought to be dismissed.

Held (dismissing encls. 45 and 39)
Per Hanipah Farikullah JCA delivering the judgment of the court:

(1) The application for contempt which was based on the alleged breach of the HC order was not a criminal contempt, merely because it arose from criminal proceedings. It was at best a complaint of civil contempt which was governed by O. 52 of the Rules of Court 2012 ('ROC'). The mere fact that the contempt complained of emanated from a criminal proceeding does not, without more, make it a criminal contempt. Proceedings for contempt are separate and distinct from the proceedings as regards the main matter before the court, be it civil or criminal. If the contempt proceedings were initiated by an aggrieved or affected party against a party in breach to enforce the order, then, it would with limited exception, be inevitably a civil contempt and the proceedings would be civil in nature. Thus, O. 52 of the ROC was applicable and

A the appellants were correct in filing the 16 June 2021 MOA and AR in accordance with O. 18 of the RCA. As such, encls. 45 and 39, respectively, in Appeals 202 and 203, were struck off with each party to bear their own costs. The 16 June 2021 MOA and AR were directed to be used in Appeals 202 and 203. (paras 42-45)

B **Case(s) referred to:**

Miller v. Miller 652 SE 2d 754 ***(refd)***

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Uthayakumar Ponnusamy v. Abdul Wahab Abdul Kassim & Ors [2018] CLJU 1333; [2018] 1 LNS 1333 HC ***(refd)***

C *Uthayakumar Ponnusamy v. Abdul Wahab Abdul Kassim (Pengarah Penjara Kajang) & Ors [2020] 1 CLJ 82 CA* ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing And Proceeds Of Unlawful Activities Act 2001, ss. 44, 50

D Courts of Judicature Act 1964, s. 53(1)

Rules of Court 2012, O. 52

Rules of the Court of Appeal 1994, O. 18, O. 65(1)

Rules of the High Court 1980, O. 52 r. 1(2)(a)(ii)

For the appellants - Shamsul Sulaiman, Khoo Guan Huat & Melissa Long Lai; M/s Shearn Delamore & Co

E *For the respondent - Gurbachan Singh; M/s Bachan & Kartar*

[Editor's note: Appeal from High Court, Ipoh; Criminal Application No: AA-44-1-01-2020 (affirmed).]

F *Reported by Syamim Ariffin*

JUDGMENT

Hanipah Farikullah JCA:

G **Introduction**

[1] The appellant filed two motions before us (encl. 45 in Appeal 202 and encl. 39 in Appeal 203) for abridgement of time to file and serve their petition of appeals in order for their appeals to be accepted as valid and proper.

H **[2]** The two motions were filed by the appellant pursuant to a preliminary objection raised by the respondent that the two petitions of appeal filed in both appeals were contrary to O. 65(1) of the Rules of the Court of Appeal 1994 ("RCA 1994") and s. 53(1) of the Courts of Judicature Act 1964 ("CJA 1964").

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[3] The respondent is the applicant in these committal proceedings. The appellants were cited by the respondent for non-compliance with the court order. The leave to commence the two committal proceedings was granted by the High Court. The appellants filed an application before the High Court to set aside the leave application but were refused by the High Court. Hence, the appellants appealed to the Court of Appeal.

Background Facts

[4] The background facts leading to the filing of these appeals are as follows.

[5] The respondent's accounts with the first appellant *ie*, CIMB Bank Berhad (hereinafter referred to as "the bank") were frozen *vide* two freezing orders dated 30 April 2014 and 15 May 2014 respectively, pursuant to s. 44 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFPUAA").

[6] Prior to the lapse of the freezing orders, a s. 50 AMLATFPUAA seizure order dated 24 July 2014 ("s. 50 seizure order") was issued by the Public Prosecutor directing the bank to seize the respondent's accounts with the bank.

[7] On 23 July 2020, the Ipoh High Court ordered that the respondent is at liberty to utilise her properties that were unlawfully seized by the Public Prosecutor.

[8] *Vide* a letter dated 24 July 2020, the respondent's solicitor served the bank with the court order dated 23 July 2020 in order to inform the bank that both freezing orders were set aside and that the respondent was free to deal with her accounts.

[9] On 3 August 2020, the bank filed an application for clarification of the 23 July 2020 court order to clarify the ambit of the 23 July 2020 court order as:

(i) the 23 July 2020 court order only made reference to the s. 44 freezing orders as having been set aside (the s. 50 seizure order not mentioned); and

(ii) the bank was not a party to these subject proceedings and not named as a party to the 23 July 2020 court order.

[10] At the hearing of the bank's clarification application on 11 August 2020, the learned High Court Judge took the position that as the bank was not a party to the proceedings, the bank had no *locus standi* to seek clarification of the court order dated 23 July 2020. However, the learned High Court Judge did state that the 23 July 2020 court order was intended to also set aside the s. 50 seizure order.

[11] Following the feedback from the clarification, on 11 August 2020, the bank released the respondent's accounts.

[12] The respondent's solicitor, by its letter dated 25 August 2020 to the bank, gave notice that the respondent will not pursue committal proceedings against the bank for failing to comply with the order dated 23 July 2020 if the bank or its solicitors tender an unreserved apology to the Ipoh High Court Judge within seven days.

[13] On 28 August 2020, the bank through its solicitor handed a copy of a letter of apology dated 27 August 2020 and the solicitor's letter dated 28 August 2020 to the learned High Court Judge's secretary placing on record that at no time had the bank and/or its solicitors intended to act in breach/contempt of the 23 July 2020 court order and explaining the events that passed since such order.

[14] The respondent had however by such date already filed its *ex parte* application and obtained leave to commence the first committal proceedings against the appellants on 18 August 2020.

[15] The appellants proceeded to file encl. 47 to set aside the order for leave granted for the respondent to commence the first committal proceedings.

[16] The respondent had also obtained leave to commence the second committal proceedings against the appellants on 8 January 2021.

[17] Following that, the appellants proceeded to file encl. 71 to set aside the order for leave granted for the respondent to commence the second committal proceedings against the appellants.

[18] Both encls. 47 and 71 were heard together and were dismissed by the High Court Judge. Following to the dismissal, the appellants filed in this court Appeal 202 against the decision on encl. 71 and Appeal 203 against the decision on encl. 47.

[19] The appellants then filed encl. 45 in Appeal 202 and encl. 39 in Appeal 203 to regularise their petitions of appeal filed out of time in order for their appeals to be accepted as valid and proper.

Preliminary Objections

[20] On 19 November 2021, the respondent by a 'notis bantahan awal terhadap rayuan-rayuan' dated 19 November 2021 (encl. 36 in Appeal 202 and encl. 30 in Appeal 203) raised a preliminary objection, *inter alia*, that the petitions of appeal filed by the appellants in both Appeals 202 and 203 failed to comply with r. 65(1) of the RCA 1994 and s. 53(1) of the CJA 1964.

The Facts Leading To The Applications

[21] Following to the filing of Appeal 202 and Appeal 203, the appellants on 16 June 2021, had filed and served on the respondent's solicitors, appeal records for Appeal 202 and Appeal 203 together with the memorandum of appeals relating to both appeals.

[22] On 5 July 2021, at the case management before the Court of Appeal's Deputy Registrar, attended to by solicitors for the appellants and the respondent, the Deputy Registrar directed that:

(i) as appeal records had already been prepared by the Ipoh High Court (since the appeals originated from a criminal court), the appeal records prepared by the Ipoh High Court would apply to the appeals and the appeal records prepared by the appellants' solicitors were expunged; and

(ii) the appellants' solicitors file/serve the petitions of appeal for both appeals containing the appellants' grounds of appeal on/before the next case management on 11 August 2021.

[23] Pursuant to the 5 July 2021 directions, the petitions of appeal were duly filed by the appellants on 11 August 2021.

[24] On 11 August 2021, a case management was held before the Court of Appeal Registrar attended to by solicitors for the appellants and respondent. The Court of Appeal Registrar confirmed the appellants' petitions of appeal in the Court of Appeal filing system and gave directions for filing of written submissions and fixed a hearing date of the appeals.

Submission Of The Parties

[25] The respondent submitted that the petition of appeals must be filed within ten days upon receipt of the appeal records according to s. 53(1) of the CJA 1964. Thus, the petitions of appeal should have been filed by the appellants on 11 July 2021 as the appeal records containing the High Court's ground of judgment were served on 1 July 2021 and the receipt was confirmed by the appellants' counsel on 2 July 2021.

[26] The respondent highlighted that even though the appeals read "Rayuan Jenayah", the appellants' solicitors have prepared 16 June 2021 appeal records together with memorandum of appeal on their own accord like a civil appeal.

[27] Further, the respondent contended that the appellant's affidavit in support of their motions filed herein contained a serious allegation against the Deputy Registrar when it was stated that the Registrar allegedly directed the appellants' solicitor to file the petition of appeals on/before the next case management date on 11 August 2021, which is way beyond the statutory

required ten days time limit. It is argued by the respondent that the appellants' solicitors should have been aware that the Deputy Registrar cannot override a statutory provision (*ie*, s. 53 of the CJA 1964) to grant an extension of time to file petitions of appeal.

[28] Therefore, the respondent submitted that as there are no other explanations as to why the appellants could not file the petition of appeals on or before 11 July 2021, hence, the respondent's application ought to be dismissed.

[29] On the other hand, the appellant contended that the respondent's preliminary objections notice dated 19 November 2021 (which were served on the appellants' solicitors on 22 November 2021, nine days prior to the hearing of Appeal 202 and Appeal 203 on 6 December 2021) of non-compliance with r. 65(1) of the RCA 1994 and s. 53(1) of the CJA 1964, is an afterthought and an abuse of the court's process.

[30] It is the contention of the appellant that the respondent did not raise any objections to the petitions of appeal:

(i) on the 5 July 2021 case management when directions by the Court of Appeal were given for filing of the petitions of appeal on/before 11 August 2021;

(ii) upon receipt of the petitions of appeal on 10 August 2021; and

(iii) at any of the subsequent case managements on 11 August 2021 and 6 September 2021.

[31] The appellants also contended that the 16 June 2021 appeal records together with memorandum of appeal were filed based on the civil nature of committal proceedings and appeal against the committal leave orders regardless of the originality of criminal proceedings before the High Court.

[32] It was stressed by the appellants that the memorandum of appeal and the petition of appeal are both identical and were received by the respondent without any objection until three months later *vide* the notice of preliminary objections dated 19 November 2021.

[33] Therefore, it was submitted for the appellants that the preliminary objections were an afterthought and an abuse of the court's process particularly when the appellants have filed motions to enlarge/abridgement of time with full explanation given on the reasons for the delay.

[34] Whilst maintaining the position that the 16 June 2021 memorandum of appeals were in due compliance with the rules that apply with the petitions of appeal satisfying the administrative requirement for 'criminal appeals', the appellants had in the abundance of caution filed this application to enlarge time until 10 August 2021 for filing/service of the petitions of appeal.

Decision

[35] It must be noted that Appeal 202 and Appeal 203 arose from the appeals by the appellants against the two decisions of the High Court which granted leave to commence committal proceedings against the appellants.

[36] Referring to the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849, this court in *Uthayakumar Ponnusamy v. Abdul Wahab Abdul Kassim (Pengarah Penjara Kajang) & Ors* [2020] 1 CLJ 82 states that it is well established that contempt of court can be classified into two distinct categories, that is civil or criminal.

[37] In England, the general approach has been that a criminal contempt is an act which so threatens the administration of justice that requires punishment whereas by contrast, a civil contempt involves disobedience of a court order. However, O. 52 of the RHC is inapplicable for contempt in criminal proceedings where the contempt is in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court (see O. 52 r. 1(2)(a)(ii) of the RHC). One thing is clear, be it civil or criminal contempt, the standard of proof required in either type is the same, which is beyond reasonable doubt.

[38] Contempt has been reclassified either as (i) a specific conduct of contempt for breach of a particular court order; or (ii) a more general conduct for interfering with the due administration or the course of justice. This classification is better explained in the words of Sir Donaldson MR in *Attorney-General v. Newspaper Publishing Plc*, (*supra*) at p. 362:

> Of greater assistance is the reclassification as (a) conduct which involves a breach, or assisting in the breach, of a court order; and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a special form of the latter, such inference being a characteristic common to all contempts per Lord Diplock in *Attorney-General v. Leveller Magazine Ltd* [1979] AC 440 at 449.
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> (See *Tan Sri Dato' (Dr) Rozali Ismail & Ors*, *supra*)

[39] The difference in classification between civil and criminal contempts was explained by this court in *Uthayakumar* by referring to *Miller v. Miller*, 652 SE 2d 754 – SC: Court of Appeals 2007, the Court of Appeals of South Carolina, and it would be apposite to quote the relevant passage from that decision, as it is highly persuasive and relevant to the issue at hand:

> The determination of whether contempt is civil or criminal depends on the underlying purpose of the contempt ruling. In *Floyd v. Floyd*, we provided a comprehensive review of the differences between civil and criminal contempt:

> The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant.
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> The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.

[40] Equally importantly, this court went on to state that in civil contempt, the party complaining of the breach initiates contempt proceedings; whilst in criminal contempt, the court of its own motion frames the complaint against the alleged contemnor, or the Attorney General, or the party with sufficient interest in the subject matter, moves the court.

[41] Following the approach of this court in *Uthayakumar*, we are of the view that the committal proceedings against the appellants are a civil action. A breach of the court orders is usually regarded as civil contempt. A criminal contempt is where the Public Prosecutor initiates the action or where the contempt is in the face of the court, in the sense that the conduct in question interferes with the due administration of justice. (See: *Uthayakumar Ponnusamy v. Abdul Wahab Abdul Kassim & Ors* [2018] CLJU 1333; [2018] 1 LNS 1333).

[42] In light of the above, we are of the view that the application for contempt which is based on the alleged breach of the High Court order dated 23 July 2020 is not a criminal contempt, merely because it arose from criminal proceedings.

[43] We find that it is at best a complaint of civil contempt which is governed by O. 52 of the Rules of Court 2012. The mere fact that the contempt complained of emanates from a criminal proceeding does not, without more, make it a criminal contempt. Proceedings for contempt are separate and distinct from the proceedings as regards the main matter before the court, be it civil or criminal. If the contempt proceedings are initiated by an aggrieved or affected party against a party in breach to enforce the order, then, it would with limited exception, be inevitably a civil contempt and the proceedings are civil in nature. Thus, O. 52 of the Rules of Court 2012 is applicable.

[44] Hence in our view, the appellants were correct in filing the memorandum of appeal and the records of appeal in accordance with O. 18 of the RCA 1994.

Conclusion

[45] For the above reasons, we are of the view that encl. 45 in Appeal 202 and encl. 39 in Appeal 203 for abridgement of time to file petition of appeal are therefore struck off. Each party is to bear their own cost. Consequently, we are directing the appeal records filed on 16 June 2021 to be used in Appeal 202 and Appeal 203.